Supreme Court of the United States

OCTOBER TERM, 1939.

No. 8.

ZIFFRIN, Incorporated, - - - - - - Appellant,

versus

JAMES W. MARTIN, Commissioner of Revenue of the Commonwealth of Kentucky, Et Al., - - Appellees.

REPLY BRIEF FOR APPELLANT.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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TABLE OF CASES, STATUTES AND KENTUCKY CONSTITUTIONAL PROVISIONS.

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v.

JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY, ET AL., - - - - - - - - *Appellees.*

REPLY BRIEF FOR APPELLANT.

We desire herein, as succinctly as may be done, to analyze the more pertinent and important decisions cited and relied upon in the brief for appellees, and to make reply to certain of the arguments advanced in that brief,—without conceding the merits of other matters urged by opposing counsel, discussion of which is omitted because of limitations we feel should be imposed.

I.

REPLY TO COMMERCE CLAUSE ARGUMENT.

The arguments advanced by opposing counsel, and the decisions cited by them, do not demonstrate that the Control Law is not obnoxious to the Commerce Clause and Acts of Congress enacted in pursuance thereof.

We shall disregard detailed discussion of many cases cited by opposing counsel, of no relevancy whatever, because the commerce involved was intrastate in character, such as *Minnesota Rate Cases*, 230 U. S. 352; *Townsend* v. *Yeomans*, 301 U. S. 441; *Samuels* v. *McCurdy*, 267 U. S. 188; *Hodge Co.* v. *Cincinnati*, 284 U. S. 335; *Stephenson* v. *Binford*, 287 U. S. 251, and *Eichholz* v. *Public Service Comm.*, 306 U. S. 268. In this connection we likewise shall disregard cases cited by opposing counsel, in which the facts showed only *incidental* and *indirect* interferences with interstate commerce in matters of local concern and where (unlike the case at bar) the field of regulation was unoccupied by Federal legislation, such as *Sherlock* v. *Alling*, 93 U. S. 99; *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177; *Nashville, Chattanooga & St. Louis R. R. Co.* v. *Alabama*, 128 U. S. 96; *Hennington* v. *Georgia*, 163 U. S. 299; and *Kelly* v. *Washington*, 302 U. S. 1.

Neither shall we enlarge upon *Clason* v. *Indiana*, 306 U. S. 439; *Sligh* v. *Kirkwood*, 237 U. S. 52, or *State Board of Equalization* v. *Young's Market*, 299 U. S. 59, all sufficiently discussed in the principal brief for appellant.

However, we deem it important to analyze in some detail three cases upon which appellees' counsel appear principally to rely in support of their contention that it is competent for the State to prohibit the exportation of intoxicating liquors. The authorities so relied upon are: *Kidd* v. *Pearson*, 128 U. S. 1; *Geer*

v. *Connecticut*, 161 U. S. 519; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349.

Kidd v. *Pearson*, *supra*, involved an Iowa Statute which prohibited the manufacture of liquor except for medicinal, sacramental and scientific purposes. Kidd held a license to manufacture for such non-beverage purposes. He had manufactured liquors but the same had not been devoted to the mentioned non-beverage purposes but had been sold by him in other States for beverage purposes. The State brought suit in equity seeking the abatement of Kidd's distillery as a nuisance. Kidd contended that in application to his business the statute constituted an interference with interstate commerce. The Court drew a sharp line of demarcation between manufacture and commerce, pointed out that the former necessarily preceded commerce and that manufacture was essentially and exclusively an intrastate and domestic affair; further pointed out and held that the manufacture for other than the non-beverage purposes permitted by the statute was illegal and the distillery consequently subject to abatement as a nuisance, irrespective of the fact that after such illegal manufacture was completed the product was introduced into interstate commerce. In other words, the contemplated subsequent commerce was not permitted to save the illegal manufacture from the denunciation of the statute. This decision, however, is not in any sense the equivalent of a ruling that it would have been competent for Iowa to have prohibited exportation of intoxicants brought into ex-

istence in a legal manner, and the Court took pains to make this perfectly clear, saying:

> "The proposition that, *supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded.* Here, however, the very question underlying the case is whether the goods ever came lawfully into existence." (Italics ours.)

In *Hudson County Water Co.* v. *McCarter, supra,* the Court sustained the validity of a New Jersey statute which prohibited a riparian owner from diverting the water of a New Jersey river to New York State for commercial purposes. This is an entirely different question from that presented in the case at bar, inasmuch as the diversion so prohibited amounted to alienation of a part of the public domain, owned in common by all of the people of New Jersey and in which the riparian owner had special, qualified interests, but certainly no fee simple title.

Geer v. *Connecticut, supra,* certainly sustained the validity of a Connecticut statute which prohibited the killing of game birds for the purpose of selling the same in interstate commerce. The Court held that game birds are *ferae naturae,* that they are owned in common by all of the citizens of the State, with the result:

> "The common ownership imports the right to keep the property, if the sovereign so chooses, always within the jurisdiction for every purpose"

and

"to confine the use of such game to those who own it, the people of that state."

It is to be observed that Mr. Justice Brewer and Mr. Justice Peckham took no part in the decision, and that Mr. Justice Field and Mr. Justice Harlan vigorously dissented on the ground that when reduced to possession by the hunter the birds became the private property of the taker and thereupon subject to the protection of the Commerce Clause. Nevertheless, the majority opinion took the view, and we concede the decision holds, that game birds, after having been reduced to possession, nevertheless, are part of the natural resources of the State, and at the sovereign's election may be excluded from interstate commerce. However, the strength and persuasiveness of this decision in application to the situation existing at bar are reduced to the vanishing point by the Court's later decisions dealing with other natural resources of the States and holding that interstate commerce therein may not be prohibited by the States, particularly the *natural gas cases, West* v. *Kansas Natural Gas Co.*, 221 U. S. 229; *Pennsylvania* v. *West Virginia*, 262 U. S. 553, 263 U. S. 350; *Missouri* v. *Kansas Natural Gas Co.*, 265 U. S. 298; *Haskell* v. *Kansas Natural Gas Co.*, 224 U. S. 217; *Peoples Natural Gas Co.* v. *Public Service Comm.*, 270 U. S. 550, and the case of oil transported in pipe line, *Eureka Pipe Line Co.* v. *Hallahan*, 257 U. S. 267. We concede that it is difficult to harmonize the decision in *Geer* v. *Connecticut, supra*, with the decisions in the cited oil and gas cases. With respect

to such reconciliation perhaps nothing better can be said than so sagely was remarked by Mr. Justice Holmes in writing the opinion for the Court in *Hudson County Water Co.* v. *McCarter, supra:*

> "It constantly is necessary to reconcile and to adjust different constitutional principles, *each of which would be entitled to possession of the disputed ground but for the presence of the others* * * *." (Italics ours.)

Alcoholic liquors—things never part of the public domain, things never *ferae naturae,* but manufactured products—are more closely akin to the automobile bodies in transit in *Michigan Public Utilities Co.* v. *Duke,* 266 U. S. 570, than they are to game birds. This view would seem to find support in the decision in *Heyman* v. *Hayes,* 236 U. S. 178. The attempted imposition of the privilege tax upon exports of liquor, there denounced, certainly constituted less interference with interstate commerce than an absolute prohibition of exportation.

Furthermore, as we have argued in our principal brief, exportation and importation are but different aspects of the same transaction, and under the Commerce Clause exportation of intoxicants now is entitled to the same full measure of protection that was accorded importation of intoxicants prior to the adoption of the 21st Amendment and the enactment of the Wilson Act, the Webb-Kenyon Act and kindred legislation.

We do not believe that the cases relied upon by opposing counsel show that there is any attribute of sovereignty which enables a State to allow the domestic manufacture, transportation and sale of intoxicants, to permit the exportation thereof by the distiller, by common carriers by rail and by common carriers by motor, and simultaneously to prohibit exportation thereof in interstate commerce by contract carriers by motor.

Neither is it to be overlooked that *Congress had not occupied the field of regulation with which the Court was concerned in Geer* v. *Conn, supra.*

II.

NEITHER THE CONTROL LAW NOR THE FACTS SUPPORT APPELLEES' CONTENTION THAT THE WHISKEY INVOLVED WAS MANUFACTURED UPON CONDITION THAT IT WOULD BE CARRIED ONLY BY THE DISTILLER OR BY COMMON CARRIERS.

Neither the provisions of the Control Law nor the facts support appellees' contention (opposing brief, pp. 23, 24, 26) that the whiskey here involved was manufactured upon condition that it would be carried only by the distiller or by common carriers.

Kidd v. *Pearson, supra,* admittedly holds, and the rule is, that a State may absolutely prohibit the manufacture of intoxicants except for specified non-beverage purposes and may permit manufacture conditional upon the distillation being for the specified permitted purposes.

Opposing counsel undertake to find in Kentucky's 1938 Kentucky Alcoholic Control Law a basis for invoking this rule, to the end that they may argue that the Control Law permits manufacture upon condition that the manufactured product will be transported only by the distiller or by common carriers, and to the further end of arguing that unless so transported the manufactured product is not to be deemed "property" within the meaning of that term as used in Motor Carrier Act, 1935. However, the provisions of the Control Law and the facts in this case are such as not to be susceptible to the application of the mentioned hypertechnical theory.

Before approaching the particular provisions of the Control Law in question and the pertinent facts before the Court, we desire briefly to analyze and to put in their proper setting the cases upon which opposing counsel rely.

Clark v. *State* (Tenn.). 113 S. W. (2d) 374.

Tennessee had been a bone-dry State. Tennessee enacted a so-called, and somewhat unique, local option law, which permitted the voters of a particular county to determine whether intoxicants might be made within its confines solely for export to and sale in other States, all sales within Tennessee continuing prohibited. The suit represented a contest between a State official and a county official with respect to whether such a local option election should be held, and it seems clear from a reading of the opinion that the suit was of a friendly

character for the purpose of testing the constitutionality of the statute, primarily under the Tennessee Constitution. It is true that the law provided that liquors so manufactured should be transported only by the manufacturer or by common carriers. However, no contract carrier was a party to the proceeding, the question of transportation by manufacturer or common carrier was but one among a multitude presented and was a minor issue, almost an insignificant one, dealt with in passing with but the briefest and most scant attention. *No mention was made of Motor Carrier Act, 1935.* It is an understatement merely to say that the case is not a persuasive one.

Another case relied upon in the same connection by opposing counsel is *Jefferson County Distilling Co.* v. *Clifton*, 249 Ky. 815, which properly to be understood must be read and considered in its proper setting and perspective. *This case was not decided under the 1938 Alcoholic Beverage Control Law.* It was *decided* prior to the repeal of the 18th Amendment to the Federal Constitution and at a time *when Kentucky was "dry"* under a prohibition amendment to the State's Constitution and under the Rash-Gullion Act, the enforcement act enacted pursuant to that amendment, both quoted in the opinion. *Like the Iowa statute in Kidd* v. *Pearson, supra,* both the State Constitutional Amendment and the Rash-Gullion Act prohibited, and denounced as criminal offenses, the manufacture, sale or transportation of intoxicants *except* for sacramental, medicinal, scientific or mechanical purposes, provi-

sion for which exceptions was made in the amendment's and statutes' *principal enacting clauses.* The provisions of the Control Law, of course, are of quite a different character. The facts of the case—of a distinguishable character—also are important. The Jefferson County Distilling Co. was a Kentucky corporation, authorized by its charter to engage in the business of a distiller and had been so engaged consistently with the provisions of the Volstead Act and the Kentucky prohibition laws. In 1933, when it became apparent that repeal of the 18th Amendment was probable, the Distilling Company became desirous of increasing its capital stock and of selling its shares to the public. In that connection it made application to the appellee, Miss Clifton, Deputy Commissioner of the Kentucky Securities Department in charge of the Securities Division, for permission to do so, and in compliance with the various "blue-sky" requirements the distiller filed with Miss Clifton a copy of the prospectus which it proposed to use in connection with the sale of the new securities. This prospectus stated that in the event of the repeal of the 18th Amendment, and, *even though the State Constitutional Amendment and the Rash-Gullion Act should not be repealed,* the distiller would be authorized to engage in the manufacture of whiskey in the State of Kentucky *for beverage purposes and to transport and sell its whiskies for beverage purposes in other States.* Miss Clifton deemed these representations of the prospectus to be incorrect and misleading, and accordingly refused to allow the shares to be sold under the prospectus.

Thereupon, the distiller brought suit against Miss Clifton under the Declaratory Judgment Act, and the Court of Appeals held that Miss Clifton's view was correct and that the representations in the prospectus were erroneous.

The opinion in the case was written in contemplation of the existing law, including the then existing State dry laws, constitutional and statutory, prohibiting all manufacture, sale or transportation of intoxicants except for mentioned non-beverage purposes. The case thus was analogous to *Kidd* v. *Pearson, supra,* which the Kentucky Court cited and followed. But in 1934 and 1935 the State prohibition amendment and the Rash-Gullion Act were repealed. (See notes to Ky. Const., Sec. 226a appearing in Baldwin's 1936 Revision of Carroll's Ky. Stats., and Act of March 17, 1934, 1934 Ky. Session Acts, c. 146, Art. IX, Sec. 1, p. 663.) Since repeal of prohibition, and under the 1934 Liquor Control Act and the 1938 Control Law in question the laws of Kentucky have been materially different from those which evoked the expressions of the opinion quoted at page 34 of the opposing brief, and under presently existing laws, the views so expressed would be inappropriate. (See predecessor to present Control Law—Act of March 17, 1934, Session Acts 1934, c. 146; Baldwin's 1936 Revision of Carroll's Kentucky Stats., Sec. 2554b-1, *et seq.*)

If for purposes of argument it be conceded that in the exercise of its sovereign powers a State may permit manufacture of intoxicating liquors only upon speci-

fied valid conditions, the theory and proposition so conceded are totally inapplicable to the facts of the case at bar.

From March 17, 1934, to July 1, 1938, on which latter date the licensing provisions of the Control Law became effective, there was no law in Kentucky providing that intoxicants could be transported only by the distiller or by a common carrier, and during that period, as the complaint alleges (R. 8, 9), Ziffrin, Inc., was duly licensed by the appropriate Kentucky authorities to transact its liquor exportation business, and was engaged therein. Suddenly, on July 1, 1938, and by the operation of the pretended provisions of the Control Law, Ziffrin was declared ineligible further or longer to conduct its business. We take the liberty of asking one rhetorical question,—what liquor was Ziffrin prevented from hauling on and after July 1, 1938, when was that liquor made, and what, if any, were the conditions annexed to its manufacture? Obviously, that liquor was made prior to *July 1, 1938. Prior to July 1, 1938*, no condition of transportation by common carrier was annexed to the privilege of manufacturing liquor in Kentucky. We are indebted to the brief for appellees, page 63 and footnote at page 4, showing that on *June 30, 1938, stored in internal revenue bonded warehouses in Kentucky* were stocks of intoxicating liquors of a volume *exceeding 192,350,000 gallons.* The record does not show it, but the Court, we presume, will take judicial notice, that on July 1, 1938, and immediately thereafter and

for some period of time thereafter, Ziffrin was not engaged to transport to the consuming markets in Indianapolis and Chicago corn whiskey hot from the stills, that its contracts of carriage contemplated the transportation of aged liquors and part of the stock of upwards of 192,350,000 gallons manufactured prior to June 30, 1938, and prior to the time that any conceivable claim can be made that the whiskey was manufactured subject to the condition that it be transported by distiller or by common carrier. Nothing in the record in this case shows, and nothing in the record in this case could be made to show, that on July 1, 1938, or at any time up to the present, appellant proposed to carry a single gallon of unaged liquor manufactured subsequent to June 30, 1938. That would seem sufficient to dispose of the specious contention that the Control Law is valid because it imposed transportation by common carrier as a condition of manufacture.

However, we shall go a step farther. Possibly the theory (dangling *in nubibus*) of an annexed condition, obligatory upon a Kentucky distiller engaging in manufacture in the State, will prove acceptable to an occasional mind hospitable to theories unduly refined and technical. Perhaps such minds will envisage a compact, tacitly assented to, entered into between the distiller and the State according the privilege of manufacture to the distiller and imposing upon the distiller the condition of transportation in his own vehicles or by common carrier. But minds which accept that theory will find difficulty in binding Ziffrin,

Inc., to the bargain. Ziffrin, appellant, is an Indiana corporation. Nothing in its chartered existence subjects appellant to Kentucky law. No Kentucky law can exclude appellant from penetrating Kentucky in the transaction of interstate commerce. Consequently, though a domestic distiller making a run of whiskey in contemplation of existing law conceivably might be taken to have submitted to the conditions supposed to be imposed by that law, no such assertion may be made with respect to Ziffrin's operations.

We proceed a third step. Previously we have assumed that the Control Law appends to the grant of the privilege of manufacturing the condition of transportation by common carrier. The truth is that in according the privilege and distiller's license to the manufacturer, the Control Law does no such thing. The only transportation restriction coupled with the grant of the privilege of distilling is that found in Sec. 21, Baldwin's 1939 Supplement to Carroll's Ky. Stats., Sec. 2554b-118, providing: "* * * no distilled spirits or wine shall be transported on the same truck or vehicle with malt beverages, except by a common carrier."

The truth of the matter is that the eligibility requirements exacted of applicants for a Transporter's License are imposed by an entirely separate and distinct section of the Control Law, Section 54, sub-paragraph 7 (Appendix to principal brief for appellant, p. 10). There are provisions pertaining to the permitted and prohibited activities of distillers on the one

hand (Secs. 21 and 22, *infra*) and of transporters on the other. (Sec. 27, aforesaid Appendix, p. 5.) There is nothing whatever in the Act which provides, or even suggests, that the privilege of manufacturing liquor is granted upon the condition that the manufactured product shall be carried by common carriers, and that unless it be so carried the product does not acquire the status of property. On the contrary, the concluding paragraph of the contraband section (Sec. 53, aforesaid Appendix, p. 9) not less than *10 times* speaks of whiskey carried by an unlicensed carrier as *"property"*; speaks repeatedly of its *"owner"*; distinguishes between "owner" and "one in possession"; provides for decretal sale of such property, for transfer of the title thereto, and for the protection of the interests of an innocent "lienor."

The argument that whiskey is not property is stultified by the Control Law's express language and provisions, and by the adversary brief's statement, page 4, that almost 50,000 people in Kentucky are directly connected with the whiskey business.

The provisions of the Control Law according the privilege of distilling are contained in Sections 21 and 22, Carroll's Kentucky Statutes, Sections 2554b-118 and 2554b-119, which read as follows:

> "§21. *Business Authorized Under Distiller's, Rectifier's or Vintner's License, Respectively.* A distiller's, rectifier's or vintner's license, as the case may be, shall authorize the holder thereof, at the premises specifically designated in the license,

to engage in the business of distiller, rectifier, or vintner, as the case may be, as those terms are defined in this Act, and to transport for himself only any alcoholic beverage which he is authorized under this license to manufacture or sell, provided that he so transports such beverages by a truck, wagon, or other vehicle owned and operated by himself, and which shall have affixed to its sides at all times a sign of such form and size as may be prescribed by the State Board, containing among other things the name and license number of the holder of such license, and further provided that no distilled spirits or wine shall be transported on the same truck or vehicle with malt beverages, except by a common carrier.

"§22. *Transactions Permitted and Prohibited to Distillers, Rectifiers, and Vintners:* Sales and deliveries of alcoholic beverages may be made at wholesale, and from the licensed premises only, (1) by distillers to licensed rectifiers, licensed vintners, holders of special non-beverage alcohol licenses so far as they are authorized to make the purchases, or other licensed distillers; by rectifiers to licensed vintners, or to licensed distillers provided distilled spirits sold to distillers are packaged in retail containers; by vintners to licensed rectifiers or other licensed vintners, or to the holders of special non-beverage alcohol licenses; or (2) by distillers, rectifiers or vintners to licensed wholesalers; or (3) by licensed distillers, rectifiers or vintners for export out of the Commonwealth; provided, no distiller, rectifier or vintner, shall sell or contract to sell, give away or deliver any alcoholic beverages to any person, who is not duly authorized by the law of the State of his residence

and of the Federal Government if located in the United States, to receive and possess said alcoholic beverages; and in no event shall he sell or contract to sell, give away or deliver, any of his products to any retailer or consumer in Kentucky.

"Distillers may purchase distilled spirits only from other licensed distillers in this Commonwealth or in another state, territory or province.

"Rectifiers may purchase distilled spirits or wine only from distillers or vintners licensed under this Act; or from non-residents duly authorized by the law of the State of their residence and by the Federal Government, if located in the United States, to make the sales.

"Vintners may purchase distilled spirits or wine only from distillers or vintners licensed under this Act or from non-residents duly authroized by law of the State of their residence and by the Federal Government, if located in the United States, to make the sales.

"Provided nothing in this Act shall be construed to prohibit the purchase or sale of warehouse receipts by any person or persons but this provision shall not authorize the owner of any such receipt to accept delivery of any distilled spirits unless the owner is qualified under this law to receive the same."

Nothing in the elaborate provisions quoted suggests annexation of the supposed condition.

Despite considerations previously suggested and the further fact that, together with all other property, whiskey is taxed in Kentucky on an *ad valorem* basis, at page 19 of their brief opposing counsel say:

"As Kentucky has said that liquor may only be manufactured and trafficked in in Kentucky according to her laws, one of which is that it shall only be transported by a licensee under this Act in question, or a railroad or railway express company, *there is no property right in such liquor transported in any other fashion and hence it is not property within the meaning of the Motor Carrier Act of 1935.*" (Italics ours.)

We previously have suggested that the liquor in question was not manufactured subject to the terms of the Control Law, but was manufactured before enactment of the Control Law. Were the facts otherwise, nevertheless in any realistic view it could not well be said that liquor is not to be deemed "*property*" within the meaning of the Motor Carrier Act, 1935. When Ziffrin operates its trucks in Louisville it submits to the conditions imposed by valid Kentucky laws, city ordinances included. If the argument to which we reply is sound, then it logically would follow that if one of Ziffrin's drivers should offend against a speed regulation prescribed by the Kentucky Statutes or by Louisville ordinance, or should fail to sound his horn at an intersection, or should take on a load in excess of the prescribed maximum, or should park by a fire hydrant, that thereupon and forthwith the truck not only ceases to be "property" under Kentucky law, but also ceases to be a "motor vehicle" within the meaning of Motor Carrier Act, 1935. Fictions are invented and manipulated by courts always to accomplish justice, never to wreak spoliation. Some arguments—and

counter arguments, as well—may be pressed too far. We desist.

III.

THE ARGUMENT OF OPPOSING COUNSEL DOES NOT SHOW THE REQUIREMENT OF A COMMON CARRIER'S CERTIFICATE TO BE A REASONABLE REGULATION.

Opposing counsel in their brief, pages 6, 9, 44, 49, attempt to justify the requirement of a Common Carrier's Certificate on the ground that it is necessary, or at least expedient, to channelize the movement of whiskies in transit and, consequently, that it is reasonable to restrict issuance of the "Transporter's License" to common carriers by motor vehicle and to holders of such Common Carrier's Certificates, because thereby—opposing counsel assume—it will be assured that the carrier will operate to and from definite termini, on prescribed routes and on regular schedules. This assumption is contrary to the facts, and if it were consistent with the facts the requirement of a Common Carrier's Certificate nevertheless would be unreasonable, as we shall demonstrate.

The brief for appellees shows that Kentucky, in efforts to prevent diversion, relies upon written reports (pp. 9, 10) rather than upon actual policing of the highways (p. 5). These reports would prove as effective with respect to carriage by contract carriers by motor as to carriage by common carriers by motor.

Motor Carrier Act, 1935, U. S. C., Title 49, Section 303, sub-sec. a, sub-parags. 14, 15 (App. to our prin-

cipal brief, p. 25), defines the two classes and distinguishes between them on the basis whether the carrier does, or does not, undertake to carry "for the general public." No mention whatever is made of termini or schedules with respect to either class, and sub-paragraph 14 expressly contemplates transportation by common carriers "over regular or *irregular routes.*"

The complaint shows Ziffrin's operations in Kentucky to be conducted within the corporate limits of the city of Louisville, a city of the first class, and within a radius of ten miles of its limits. Under Kentucky Statutes, Section 2739j-94 (Appendix to our principal brief, p. 20), even a *common carrier* so operating would be exempt from the provisions of the Kentucky Motor Vehicle Transportation Act, would not be required to obtain a Common Carrier's Certificate, and would be under no obligation to run between definite termini, on prescribed routes or on definite schedules. Thus, neither under Federal nor State law are operations between definite termini, on prescribed routes and on fixed schedules essential characteristics of common carriers; although, of course, when considerations of public convenience and necessity are injected, in order to show the existence of public necessity and convenience, contemplation of termini, routes and schedules necessarily rises to the surface. But as we have said, even under the Kentucky law a common carrier by motor vehicle, operating as Ziffrin operates, would not be required to have a Common Carrier's Certificate, would not be required to operate between fixed termini, on specified routes or on fixed schedules. Accordingly,

opposing counsel have indulged in an erroneous assumption of fact, which vitiates their argument concerning the reasonableness of the regulation.

But if we completely dismiss from mind this first nullifying error, and if we assume that it is reasonable to require a carrier which hauls intoxicants to operate between fixed termini, on prescribed routes and regular schedules, the requirement of obtention of a Common Carrier's Certificate remains obnoxious to the Commerce Clause, to the Federal Motor Carrier Act, 1935, and to the Due Process and Equal Protection Clauses of the 14th Amendment. For purposes of argument we shall concede that it would have been, and is, competent for Kentucky, by the Control Law, or by companion legislation, to require a carrier engaged in hauling intoxicants to make reports of the character identified at pages 9 and 10 of the brief for appellees and to specify its termini, routes and schedules. All of these things we will concede reasonably, and with validity, might have been required of Ziffrin, Inc., as a contract carrier. But this is not what the General Assembly has done, except incidentally. The General Assembly, by requiring a Common Carrier's Certificate, not only has provided (in some instances, but not in all, as previously shown) for fixed termini, regular schedules and specified routes, but in addition thereto *in all instances* has imposed the obnoxious and unconstitutional burdens of showing and establishing *public convenience and necessity* and of submission to State regulation of all rates and services and has required

the assumption by contract carriers of the greater measure of liability appertaining to common carriers. No reasonable police purpose is served by the inclusion of these additional and coupled obnoxious requirements, which transcend the State's powers, and the vice of which is not purged by the circumstance that in requiring a Common Carrier's certificate the State accidentally, and in some instances, gains the claimed, but dubious, advantages of fixed termini, specified routes and regular schedules. It would have been entirely possible and readily feasible for the permissible to have been segregated from the interdicted, but this separation the General Assembly did not make.

As a plain matter of business, Schenley and Seagram are vitally interested in seeing to it that their customers' orders are filled by delivery of the consigned cargoes. Ziffrin's consignee-customers, who purchase their requirements from Jefferson County distillers, have a corresponding interest in receiving the merchandise they order. If Ziffrin, or any other carrier engaged to render transportation services by either distillers or purchasers, diverted the cargoes and omitted to deliver the same to the purchasers, the diversion evil—without intervention of Kentucky or Federal authorities—quickly would be extirpated by action of the distillers or consignee—customers themselves, who simply would cease doing business with Ziffrin or with such other offending carrier. The real source of the danger of diversion to "bootleg" channels, referred to at pages 5, 17 and 43 of the opposing

brief, is not to be found in the carriers. The source of any such existing danger is to be found at some distilleries. Curiously enough, the Control Law, Sec. 21, *supra*, permits the distiller to transport liquors of his own manufacture. We appreciate that perfect classification is not essential to the validity of a statute, but the fact that distillers are allowed to transport their own output is highly significant in connection with the contention that prevention of diversion renders the prohibition of transportation by contract carriers reasonable, particularly so when we consider that *the termini, route and schedule complex in no way affects movements of liquors by distillers.*

There is nothing in the record concerning "hi-jacking," but this subject having been injected by the brief filed by opposing counsel, pages 5, 17 and 43, for the purposes of reply, we take the liberty of going outside the record to say that Ziffrin's success in obtaining the business of the country's leading distillers has been attributable in large measure to the protection against hi-jacking which Ziffrin has afforded through the instrumentality of a convoy system which Ziffrin invented, inaugurated and maintains.

IV.

THE OPPOSING BRIEF DOES NOT SATISFACTORILY DISTINGUISH THE MOTOR CARRIER CASES.

Opposing counsel, in their brief, page 46, undertake to distinguish a number of the motor carrier cases relied upon in the principal brief for appellant upon the ground that enforcement of the statutes there involved would have prevented the transaction by the carriers of *all* business in the enacting States, whereas, in the case at bar, enforcement of the Control Law, as written, prevents Ziffrin, Inc., only from further engaging in the branch, or department, of its business devoted to the carriage of exports of whiskies from Kentucky. Admittedly this difference exists, but we do not deem it a sufficient ground for drawing a distinction or line of demarcation. The complaint alleges that since January 1, 1935, the business of transporting whiskey in export from Kentucky has been the chief and principal part of appellant's business and activities penetrating Kentucky, and the complaint shows that branch of the business to have been, and to be, a lucrative one and a part of the business giving promise of future growth and expansion (R. 9, 10, 43, 44).

It would not seem to be cogent argument to assert, as opposing counsel contend, that although under the Commerce Clause and the 14th Amendment, Kentucky's General Assembly may not prohibit *all* of Ziffrin's interstate activities penetrating Kentucky, nevertheless, it is competent for the General Assembly

to impose the ban upon the most valuable, profitable and lucrative branch of that business. It is our contention that if the Commerce Clause and the 14th Amendment prevent the imposition of a ban upon the business in its entirety, then those same constitutional guaranties adequately safeguard and protect all substantial and valuable parts, branches and departments of the business and enterprise.

V.

SEPARABILITY OF THE PENALTIES.

Opposing counsel contend that even though the penalty provisions of the Control Law be deemed too severe and excessive to be valid, nevertheless, the Control Law is not objectionable by reason thereof because (a) the denunciatory rule applicable to excessive penalties is invoked only in cases of legislative rates or "orders legislative in their nature," (b) there has been no attempt to enforce the penalties, and (c) the penalty provisions are separable.

We concede that the majority of cases in which severe penalties have been held to be void under the 14th Amendment have been cases involving rates. However, the applicability of the rule has not been confined to rate cases, as is shown by *Natural Gas Pipe Line Co. v. Slattery*, 302 U. S. 300. Whether that case represents a case of an order *legislative in its nature* within the purview of the criticism interposed by opposing counsel, we do not know. But so far as the logic of the matter goes, it would not appear that there

is good or sufficient reason for limiting application of the rule in the manner suggested by opposing counsel.

It would seem no answer to assert that there has been no attempt to enforce the penalties. Injunction is a preventive remedial process. The complaint clearly alleges threats of immediate attempts to enforce the Control Law's penal, criminal and contraband provisions. Opposing counsel cite *Grand Trunk Railway Co.* v. *Michigan R. R. Com.*, 231 U. S. 457, and *Phoenix R. Co.* v. *Geary*, 239 U. S. 277. In the former case, the Railroad Commission suspended the carrier's tariff for interchange of traffic at Detroit. The carrier brought suit to restrain the suspension order. Apparently, imposition of penalties was not threatened and no injunction was sought against their imposition. In the latter case, suit was brought to enjoin the Arizona Corporation Commission from enforcing an order directing appellant to double-track a portion of its line of street railway and to enjoin the institution of proceedings for recovery of fines and penalties. However, the opinion does not indicate that institution of such proceedings was threatened.

Where the infliction of excessive penalties is imminent and threatened, and is not attempted only because prevented by restraining order, it would not seem that an injunction should be denied because the intended attempt was so thwarted. Were this Court to rule as urged by appellees' counsel, then as surely as in the disparaged rate cases, Ziffrin could test the penalties' validity only by violation. Certainly, de-

termination of that question in a suit such as this not only is a safer method for the carrier, but also has much to commend it as a more dignified, law-abiding and orderly approach to solution of the problem.

It is not our contention that the substantive regulatory provisions of the Control Law are invalid merely because of the excessive penalties provided for infractions. Our contentions are that the substantive provisions are void by reason of their essentially obnoxious character and substance; that they are further and additionally stripped of the last vestige of integrity and validity by reason of the coupled extravagant penalties; that substantive and deterrent provisions are void, jointly and severally; and that standing alone and separately, the penalty provisions themselves, prevention of enforcement of which is the primary concern in this case, are condemned and void by reason of their excessive character.

VI.

MISAPPREHENSION WITH RESPECT TO APPELLANT'S CONTENTIONS CONCERNING NON-AVAILABILITY OF INJUNCTION.

Apparently opposing counsel have misunderstood our contentions with respect to the non-availability of an injunction. This matter was dealt with in our principal brief, pp. 119, 80-90. We endeavored to make it clear that our contention of non-availability of an injunction was restricted to the *statutory appeals* from the decisions of the Director of the Division

of Motor Transportation, denying appellant a Common Carrier's Certificate, and from the decision of the Alcoholic Beverage Control Board, denying appellant a liquor Transporter's License. We did not mean to convey the impression that we contend that in a plenary, original injunction suit in a State Court of Kentucky, directly challenging the constitutionality of the Control Law, the injunctive process would have been non-existent.

Beacon Liquors v. *Martin, et al.*, —— Ky. —— (decided March 24, 1939, but for some reason not yet reported), cited by opposing counsel, was a plenary suit, instituted originally in the Franklin Circuit Court, challenging so much of the 1938 Alcoholic Beverage Control Law as prohibits the issuance of a retailer license to a liquor store situated within 200 feet of a church, without the assent of the church's governing body. This case *was not a statutory appeal* from a decision of the Alcoholic Beverage Control Board.

Keller v. *Kentucky Alcoholic Beverage Control Board*, 279 Ky. 272, cited by opposing counsel, was a case in which *Keller pursued the statutory appeal* from an order of the Control Board revoking his beer license. Despite the clear prohibition of the Control Law, Keller somehow succeeded in obtaining a temporary restraining order from the Franklin Circuit Court, to which his appeal was first taken, and a temporary injunction pending appeal to the Court of Appeals, the latter having been granted by a Judge of the Court

of Appeals. *The opinion gives no explanation of the ground upon which these injunctions were obtained,* manifestly in plain contravention of the express and explicit provisions of the Control Law. Upon the appeal to the Court of Appeals, Keller urged that the provisions of the Control Law prohibiting the grant of an injunction are unconstitutional. *The Court of Appeals declined to rule upon this point,* and dismissed Keller's contentions in the indicated particular on the familiar ground that no one will be permitted to question the constitutionality of a statute who is not injuriously affected thereby; and that Keller actually having been granted the injunctions despite the provisions of the Control Law to a contrary effect, Keller had not been injuriously affected by the provisions prohibiting injunctions of which he complained, and would not be heard to question their validity. This case is no authority whatever on the question whether the Control Law's provisions prohibiting the granting of injunctions in connection with statutory appeals from decisions of the Alcoholic Beverage Control Board prevents the statutory appeal from constituting an adequate remedy at law. Neither does the case afford authority upon the question whether the Control Law's provisions for drastic penalties, read in the light of its provisions forbidding injunctions, do not create a situation in which resort to the Courts in ordinary course is precluded, with the consequence that the penalties constitute both a denial of due process and of equal protection.

CONCLUSION.

In general, we repose but little confidence in comparisons and illustrations. Either the facts of the supposititious case are like those of the principal case, or they are not: in the latter event the illustration is valueless, and in the former consideration may as well be addressed to the facts of the principal case as to the facts of the illustrative case. However, in the present instance so much has been written, so many aspects have been considered, and we have been so long and in such proximity to the problem that it may be helpful to obtain the more objective, detached and fresh view of the matter which may be provided by an illustration. We accordingly take the liberty.

Like the distillation and sale of whiskey, the manufacture and sale of cigarettes is one of Louisville's and Kentucky's big industries. Like whiskey, cigarettes draw their ingredients from the State's soil, are bootlegged, and hi-jacked from trucks. As of intoxicants, this Court has said of cigarettes, that many persons entertain the view that cigarettes possess "deleterious tendencies" and "their effects may be injurious to some" (*Austin* v. *Tennessee*, 179 U. S. 343). Even as it has held with respect to liquors, this Court has held the regulation or prohibition of the manufacture, sale and advertising of cigarettes to be within the police power of the States (*Austin* v. *Tennessee, supra; Gundling* v. *Chicago*, 177 U. S. 183; *Packer Corporation* v. *Utah*, 285 U. S. 105).

In a case of first impression it would be startling to discover a decision that it is within the competence of Kentucky, under the guise of the police power, to provide by statute that cigarettes may be transported only by the manufacturer thereof or by a common carrier, and that no contract carrier by motor vehicle, even though operating with the sanction and authority of the Interstate Commerce Commission under Motor Carrier Act, 1935, shall be permitted to continue to engage in its established and profitable business of transporting export consignments of cigarettes from Louisville to Chicago in interstate commerce.

If opposing counsel are correct in their contentions, bench and bar confidently may expect the discriminatory cigarette transportation legislation and possibly the ultimate so-called "Balkanization" of the world's greatest free trade area. Our efforts are addressed to the prevention of that end result. There have been those who have been active in the erection of State barriers to interstate commerce. This case poses the question whether the trend shall be arrested or whether the architects and engineers will be commissioned to erect forty-eight staunch Chinese Walls.

Respectfully submitted,

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